BRB No. 97-944

LOUIS A. ANDRAS	)	
	)	
Claimant	)	DATE ISSUED:
	)	
v.	)	
	)	
LOUIS A. ANDRAS, JR. WELDING	)	
	)	
and	)	
	)	
HOUSTON GENERAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Roch P. Poelman and C. Michael Parks (Hebert, Mouledoux & Bland), New Orleans, Louisiana, for employer/carrier.

Mark A. Reinhalter (Marvin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (96-LHC-311) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, an incorporated owner of his own welding business, sustained a work-related back injury on September 25, 1991. Claimant had two prior back surgeries. On March 17, 1992, he underwent lumbar fusion surgery. While hospitalized following this surgery, claimant had a stroke followed by seizures, which have continued. Employer voluntarily paid temporary total disability benefits from September 25, 1991, and continuing. Claimant sought permanent total disability compensation under the Act.

An informal conference, which employer did not attend, was held before the district director on July 26, 1994. The case was referred to the Office of Administrative Law Judges on October 27, 1995. By motion dated July 11, 1996, when the case was already scheduled for a hearing before the administrative law judge, employer requested that the case be remanded to the district director for submission of its Section 8(f), 33 U.S.C.§908(f), application. Claimant objected on the ground of unfairness, and the administrative law judge denied employer's motion to remand. On August 9, 1996, employer filed a Section 8(f) application with the regional solicitor.[1] Prior to the hearing, the parties stipulated that claimant is totally disabled, that he reached maximum medical improvement from his September 1991 back injury on October 4, 1994, and that his seizures were not causally related to the work injury. The sole issue pending before the administrative law judge was employer's entitlement to Section 8(f) relief.

The administrative law judge found that employer's claim for Section 8(f) relief was

[1]The Director, Office of Workers' Compensation Programs, moved to dismiss employer's petition as untimely, alleging employer should have requested Section 8(f) relief based on a June 24, 1994 letter from claimant's then counsel to OWCP, in which counsel states he is in the process of filing a claim for permanent total disability on claimant's behalf. Director's Motion to Dismiss Ex. A. The administrative law judge noted the Director's motion, and in a September 3, 1996, letter stated the issue would be dealt with at the time of the hearing scheduled for September 9, 1996.

untimely pursuant to Section 8(f)(3) because permanency was at issue at the district director level and employer failed to file its request for Section 8(f) relief until after referral to the Office of Administrative Law Judges. On appeal, employer argues initially that the administrative law judge erred in denying its motion to remand the case for further proceedings regarding relief pursuant to Section 8(f), asserting that claimant would not have been prejudiced by the remand because he had been receiving continuing temporary total disability compensation. In addition, employer challenges the administrative law judge's determination that the filing of its application was untimely pursuant to Section 8(f)(3). Employer specifically argues that the administrative law judge erred in finding that permanency was at issue while the case was before the district director because he failed to account for the fact that claimant had initially alleged that his seizures were related to his work injury and there is no evidence that claimant's seizure condition had reached a state of permanency prior to a deposition taken shortly before the hearing on September 3, 1996. Employer avers that where claimant has two separate medical conditions, either of which could result in permanent total disability, employer's duty to file its Section 8(f) application does not arise until both conditions have reached a state of permanency. Employer further argues that the administrative law judge erred in finding that permanency was at issue while the case was before the district director because it was paying temporary, rather than permanent, total disability benefits to claimant from the time of injury up until the date of the hearing. Finally, employer asserts that because the district director's Form LS-141, Notice of Informal Conference, did not list permanency as an issue, and 20 C.F.R. §702.321(b)(ii) provides that the district director must adjourn the conference and set a date for the submission of a Section 8(f) application where the issue of permanency is raised at the informal conference, the district director's failure to follow this procedure should have been considered by the administrative law judge in evaluating the applicability of Section 8(f)(3). In light of these facts, employer urges the Board to reverse the administrative law judge's findings regarding the applicability of Section 8(f)(3) and hold that employer is entitled to Section 8(f) relief based on claimant's two prior back surgeries. The Director responds, urging affirmance.

Section 8(f)(3) provides that a request for Section 8(f) relief, "and a statement of the grounds therefor, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner." Failure to do so is "an absolute defense to the special fund's liability . . . unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order." 33 U.S.C. §908(f)(3) (1994). Section 702.321(b)(3) of the regulations, 20 C.F.R. §702.321(b)(3), provides that the defense is an affirmative one which must be raised and pleaded by the Director; the defense does not apply where permanency was not at issue before the district director. Under Section 702.321(b)(3), although an application need not be filed with the district director where claimant's condition has not reached maximum medical improvement and no claim for permanent benefits is raised, in all other cases failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund. *See Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991), *aff'g Bailey v. Bath Iron Works Corp*., 24

BRBS 229 (1991).

We affirm the administrative law judge's finding that employer's entitlement to Section 8(f) relief is barred by Section 8(f)(3) because it is rational, supported by substantial evidence, and in accordance with law.[2] *See O'Keeffe*, 380 U.S. at 359. Initially, we reject employer's contention that the administrative law judge erred in failing to remand the case to the district director for consideration of its Section 8(f) application. In a case in which the Director has properly raised the Section 8(f)(3) absolute defense before the administrative law judge, he is clearly empowered to resolve this issue. *See generally Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992). If permanency was at issue prior to referral to the Office of the Administrative Law Judges then employer's failure to file its Section 8(f) application triggered the Section 8(f)(3) bar, and the administrative law judge properly declined to remand the case as employer's application was already untimely.

We also reject employer's argument that its request for Section 8(f) relief was timely because claimant's seizure condition had not reached permanency, and it was accordingly excused from filing its application while the case was before the district director. Once claimant raised a claim for permanent disability, employer's obligation to seek Section 8(f) relief arose. *See Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1534, 24 BRBS 213 (CRT)(9th Cir. 1991); *Brazeau v. Tacoma Boatbuilding Co.,* 24 BRBS 128 (1990). Whether claimant's seizure condition had reached permanency is thus not relevant, as claimant sought permanent total disability compensation while the case was before the district director. Moreover, as claimant was only awarded permanent disability benefits in connection with his back injury, employer's entitlement to Section 8(f) relief must be considered in relation to the claim for that injury.[3] *See generally Hawthorne v. Ingalls Shipbuilding, Inc*, 28 BRBS 73, 82-83 (1994), *modified on recon.*, 29 BRBS 103 (1995).

Employer's argument regarding the applicability of Section 702.321(b)(ii), 20 C.F.R. §702.321(b)(ii), is also rejected. Section 702.321(b)(ii) of the regulations provides that where the issue of permanency is first raised at the informal conference and could not have reasonably been anticipated by the parties prior to the conference, the district director shall adjourn the conference and establish the date by which the fully documented application must be submitted and so notify employer. Contrary to employer's assertions, however, this regulation does not apply in the present case, as the issue of permanency was raised prior to the informal conference by virtue of a June 24, 1994, letter written by claimant's

[2]Employer does not dispute that upon being made aware of the filing of employer's application for Section 8(f) relief on August 9, 1996, the Director timely raised and affirmatively pleaded the absolute defense in its August 23, 1996, motion to dismiss.

[3] In rejecting employer's argument in this regard, the administrative law judge noted that even if the seizures had been work-related, claimant would not be entitled to any greater compensation as he was already permanently totally disabled by his back condition, and employer would not be entitled to any greater relief. Decision and Order at 5.

counsel and copied to the employer.

In concluding that employer failed to file a timely request for Section 8(f) relief, the administrative law judge found that numerous events occurred while the case was before the district director which should have alerted employer that permanency was at issue and accordingly of its need to seek Section 8(f) relief. On June 24, 1994, claimant's attorney wrote a letter to the Department of Labor, stating that claimant was seeking benefits for permanent total disability. Employer was sent a copy of this letter. In addition, the district director's memorandum following the July 26, 1994 informal conference, which employer did not attend, noted "permanent total disability" as an issue which had been discussed. Moreover, in an August 10, 1994, letter written to the district director, a copy of which was sent to employer, claimant's counsel reiterated the claim for permanent total disability and enclosed a copy of a July 21, 1994, report from claimant's attending orthopedic surgeon, Dr. Jackson, stating that claimant had reached maximum medical improvement and was totally and permanently disabled. Jt. Ex.2, Ex. C to Director's Motion to Dismiss. Finally, on October 5, 1994, Dr. Jackson wrote a letter to carrier, and on July 19, 1995, to its counsel, stating that claimant's back had reached maximum medical improvement, that he was disabled from work, and that his disability increased with each surgery to the point of total disability. These facts were clearly sufficient to put employer on notice that permanency was an issue in this case. *See Container Stevedoring,* 935 F.2d at 1544, 24 BRBS at 213 (CRT). Inasmuch as the administrative law judge rationally found that these documents were sufficient to place the permanency of claimant's disability in issue before the district director, and employer has not raised any persuasive reason why it could not have reasonably anticipated the liability of the Special Fund while the case was before the district director,[4] we affirm the administrative law judge's finding that Section 8(f)(3) bars employer's entitlement to Section 8 (f) relief because employer's request for such relief was untimely. *See, e.g., Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT) (5th Cir. 1991), *aff'g* 24 BRBS 248 (1991); *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991).

[4] We note that in the present case, employer does not argue that it did not possess sufficient medical evidence at the time of the informal conference to support a claim for Section 8(f) relief and that the evidence it ultimately submitted in support of its Section 8(f) relief request pre-dated the October 27, 1995, referral date. *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991).

Accordingly the administrative law judge's Decision and Order-Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge